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The Constitutional History of U.S. Foreign Policy: 222 Years of Tension in the Twilight Zone

By Walter A. McDougall

THE CONSTITUTIONAL HISTORY OF U.S. FOREIGN POLICY:

222 YEARS OF TENSION IN THE TWILIGHT ZONE

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By Walter A. McDougall

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PART I: THE FIRST AMERICAN CENTURY AS PROMISED LAND

In the Beginning: The Indispensable Man

Four months and two days after his inauguration, President George Washington and his Secretary of War Henry Knox tried to perform a Constitutional duty by seeking the advice and consent of the Senate regarding a treaty with the Creek Indian nation. Accordingly, on Saturday August 22, 1789, they dropped by the Senate chambers at Federal Hall, 26 Wall Street, New York. Knox handed a list of seven questions to Washington who passed them to the president of the Senate, John Adams, whose effort to read them was drowned out by street noise. Raising his voice, Adams repeated the first query and asked for a simple "yes" or "no" answer. A nervous silence followed until Pennsylvania's Senator William Maclay insisted on having all the documents concerning the treaty read and a motion was made to refer the whole matter to a committee. Washington "started up in a violent fret," barked, "This defeats every purpose of my coming here," then muttered on his way out the door that he would be damned if he ever went there again! In fact, he returned on Monday to get his answers, but henceforth no president has sought the advice of the Senate as a body in advance of negotiating a treaty, much less begged its counsel in person.[1]

Thus began the contentious courtship between the executive and the legislature over the making of U.S. foreign relations: a sort of perennial *pas de deux* in which the parties are not sure whether to dance or wrestle over their respective powers—either delegated or implied—by the Constitution. The dean of legal scholars in the field, Columbia University Professor Louis Henkin, called it "the tension in the twilight zone" resulting from a design for government that was "a mosaic of everyone's second choices" and established "a strange system, the strangest in the world." Yet, for all that, it has been made to work most of the time under radically different and rapidly changing historical circumstances, precisely because of the vagaries, ambiguities, and yawning silences of our amazingly terse Constitution.[2]

Just for starters, the Washington anecdote illustrates a fundamental conundrum of our representative, constitutional, and more or less democratic republic. Trusting foreign relations—issues of war and peace—solely to executive fiat was anathema to Americans then as now. But trusting such grave matters solely to the fractious, feckless committee known as Congress seemed even worse. That is why the constitutional history of U.S. foreign relations has challenged every generation of Americans to shun the extremes and draw instead on their deep reserves of pragmatism, pretense, and compromise.

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1. The primary source for this delightful anecdote is Kenneth R. Bowling and Helen E. Veit, eds., *The Diary of William Maclay and Other Notes on Senate Debates* (Baltimore, MD: Johns Hopkins University Press, 1988), pp. 128-32; see also Stanley Elkins and Eric McKitrick, *The Age of Federalism* (Oxford University Press, 1993), pp. 55-58, and Forrest McDonald, *The American Presidency: An Intellectual History* (University Press of Kansas, 1994), pp. 221-23.

2. Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press, 1990), pp. 17-43 (quotes, pp. 43).

Washington, the indispensable man whose availability to serve as first president undoubtedly reassured skeptics among Anti-Federalists and Federalists alike, established the precedents and principles that shaped U.S. foreign policy for a century. He eschewed royal pomp, yet bestowed on his office a high republican dignity. He worked with Congress to create the executive departments of State, War, and Treasury. He established the doctrines of executive privilege and executive prerogative in foreign affairs with the full support of Secretary of State Thomas Jefferson, who declared in 1790: "The transaction of business with foreign nations is executive altogether." Likewise, Washington took the initiative when the wars of the French Revolution erupted. Not only did he judge *neutrality* the only wise posture for the fragile new nation, he claimed for the executive branch the power to declare peace, as it were, even though Congress had power to declare war. So Washington decreed in April 1794 that the United States "should in sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerant [sic] Powers."[3]

Pursuant to that, Washington dispatched John Jay, then Chief Justice of the Supreme Court, overseas. He was the first in a long line of presidential alter egos in foreign affairs that would include James Monroe (for Jefferson), Nicholas Trist (for Polk), Thurlow Weed (for Lincoln), Colonel House (for Wilson), Harry Hopkins (for FDR), Henry Kissinger (for Nixon), and most recently George Mitchell and Richard Holbrooke (for Obama). The commercial treaty with Britain that Jay brought home sparked bitter controversy in 1795, but its ultimate ratification meant Senate acceptance of a pattern whereby the executive hammered out deals with foreign governments before submitting them to his own. Washington also received foreign envoys or, in the case of the egregious Citizen Edmund-Charles Genêt, demanded his recall. Washington served as commander-in-chief in person (and uniform) in the Whiskey Rebellion. But in all things he honored the Constitution, deferred to Congress over appointments, treaties, and appropriations to meet crises such as Algerian piracy, and first used the presidency as a "bully pulpit" when he warned against factional strife in foreign affairs. In almost every case, Washington's acts became precedents that shaped the process whereby U.S. foreign policy practice has evolved like Common Law ever since.

Grand Strategy and Political Sermon: Washington's Farewell Address

When Washington issued his Farewell Address in September 1796, it established as "the true policy" of the United States a grand strategy that almost every American statesman and citizen held sacred for 100 years.[4] It is worth dwelling upon, not only

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3. Washington deliberately avoided using the word "neutrality" in his Proclamation of Neutrality of April 22, 1794, out of deference to Secretary of State Jefferson's francophilia. But coincident with the hot debate between Jeffersonians and Hamiltonians over whether the United States should tilt toward France or Britain was a fierce debate concerning whether the President or Congress had the power to declare neutrality at all. See the pseudonymous exchange between Alexander Hamilton and James Madison in *The Letters of Pacificus and Helvidius with the Letters of Americanus* (Scholars' Facsimiles, 1976).

4. Washington left office in March 1797, but issued his "farewell" the previous autumn in hopes that his

because it pronounced all four of what I call the "Promised Land" traditions that informed U.S. foreign policy in the nineteenth century, but also because it is especially salient today.

Washington began with an invocation.

> Heaven may continue to you the choicest tokens of its beneficence; that your union and brotherly affection may be perpetual; that the free constitution, which is the work of your hands, may be sacredly maintained; that its administration in every department may be stamped with wisdom and virtue; that the happiness of the people of these States, under the auspices of liberty, may be complete, by so careful a preservation and so prudent a use of this blessing, as will acquire to them the glory of recommending it to the applause, the affection, and adoption of every nation, which is yet a stranger to it.

He then said, "Here, perhaps, I ought to stop," but in fact he had only begun because Washington meant to instruct his countrymen on the behaviors they must nurture in order to earn the blessing. He spoke first of unity, "the main pillar in the edifice of your real independence, the support of your tranquility at home, your peace abroad; of your safety; of your prosperity; of that very Liberty, which you so highly prize." He warned lest internal divisions born of personal ambition, faction, party, economic or regional interest dissolve the bonds of the Union that American independence, liberty, and opportunity all presupposed. Since the Constitution had forged a more perfect Union, "Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty." Indeed, Washington used the word liberty *fifteen times* in his brief address.

A liberty-loving people endowed with a good Constitution must still be vigilant because: "The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a real despotism.... The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern." But to Washington, the most "indispensable supports of political health" were spiritual, because "reason and experience both forbid us to expect, that national morality can prevail in the exclusion of religious principle." Moving to particulars, Washington preached *prudence regarding money*. "As a very important source of strength and security, cherish public credit. One method of preserving it is to use it as sparingly as possible; avoiding occasions of expense by cultivating peace, but remembering also that timely disbursements to prepare for danger frequently prevent much greater disbursements to repel it; avoiding likewise the accumulation of debts, not only by shunning occasions of expense, but by vigorous exertions in time of peace to discharge the debts which unavoidable wars may have occasioned."

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prestige and advice might boost the presidential campaign of his Vice President John Adams against the Democratic Republican candidate Thomas Jefferson. Washington had asked James Madison to compose a draft for such an address back in 1792, but four years later he relied almost exclusively on Alexander Hamilton's philosophy and essayist's skills. See Felix Gilbert, *To the Farewell Address: Ideas of Early American Foreign Policy* (Princeton University Press, 1961).

Then Washington preached *prudence regarding power*. The United States should

> Observe good faith and justice towards all Nations; cultivate peace and harmony with all. Religion and Morality enjoin this conduct; and can it be, that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and at no distant period, a great Nation, to give to mankind the magnanimous and too novel example of a people always guided by an exalted justice and benevolence.... In the execution of such a plan, nothing is more essential, than that permanent, inveterate antipathies against particular Nations, and passionate attachment for others, should be excluded; and that, in place of them, just and amicable feelings towards all should be cultivated. The Nation, which indulges towards another an habitual hatred, or an habitual fondness, is in some degree a slave.

Alluding clearly to the rancor over Citizen Genêt and Jay's Treaty, Washington warned that "Against the insidious wiles of foreign influence ... the jealousy of a free people ought to be constantly awake; since history and experience prove, that foreign influence is one of the baneful foes of Republican Government." Indeed,

> The Great Rule of conduct for us, in regard to foreign nations, is, in extending our commercial relations, to have with them as little political connexion [sic] as possible.... Europe has a set of primary interests, which to us have none, or a very remote relation.... Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off, when we may defy material injury from external annoyance ... when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel. Why forgo the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalship, interest, humor, or caprice? It is our true policy to steer clear of permanent alliances with any portion of the foreign world.

Then, hopeful realist to the last, Washington closed:

> In offering to you, my countrymen, these counsels of an old and affectionate friend, I dare not hope they will make the strong and lasting impression I could wish; that they will control the usual current of the passions, or prevent our nation from running the course which has hitherto marked the destiny of nations. But, if I may flatter myself that they may be productive of some partial benefit, some occasional good; that they may now and then recur to moderate the fury of party spirit, to warn against the mischiefs of foreign intrigue, to guard against the impostures of pretended patriotism; this hope will be full recompense for the solicitude for your welfare, by which they have been dictated.[5]

5. For the text on-line see http://avalon.law.yale.edu/18th_century/washing.asp

American Exceptionalism and Its Corollaries in Foreign Relations

Those who have read my book *Promised Land, Crusader State*, or just the *Foreign Affairs* article summarizing it, may recall the four great traditions that shaped U.S. foreign relations during the nineteenth century: Exceptionalism, Unilateralism, an American System, and Expansion.[6] At first glance my choices would seem, if you'll pardon the expression, unexceptional. But the study of the historical evidence imposed on me definitions or interpretations of these traditions that differed from conventional wisdom. For instance, I was persuaded that the Founders did believe, or wanted to believe, that the United States would be exceptional in the sense of a New Order for the Ages endowed with civil and religious liberty and a grand destiny under Providence. But contrary to myth, I argued the Founders did *not* conclude that Exceptionalism required U.S. foreign policy to be idealistic, pacifist, ideological, or militant. On the contrary, the Founders and their successors were realists who understood that a fallen or flawed human nature required that power be checked and balanced, especially in a free country. They likewise understood that naive, reckless, or arrogant behavior toward other countries, especially for the best of motives, could put at risk what *really* made America exceptional, which was her Liberty, Unity, and Independence at home. That is, America was rendered exceptional by what she *was*, at home, not by what she *did* abroad. Hence the purpose of foreign and defense policy was to prevent Old World empires from corrupting the American experiment so it would be free to prove that self-governing peoples can survive and prosper.

The second foreign policy tradition was a natural corollary. Call it Neutralism or Unilateralism, but *don't* call it Isolationism, a disparaging term of domestic propaganda not even coined until the 1890s. In fact, Americans were always deeply engaged in the Atlantic and Pacific worlds, while Washington urged friendship and commerce with all nations. His Great Rule merely warned against gratuitous meddling in European affairs lest Americans harm their own interests, surrender their freedom of action, invite attacks from abroad, and forfeit the geographic advantages that a beneficent God had bestowed.

Of course, Unilateralism also required that Europe abstain from meddling in America. Hence the third tradition was invocation of an American System of republics off-limits to the Old World monarchies. This aspiration was not given full expression, of course, until the Monroe Doctrine of 1823, and it remained something of a bluff for 70 years. But the notion of a separate sphere is already there in Washington's Farewell.

The fourth tradition, Expansion, was a natural corollary of all the above. It was labeled Manifest Destiny by John O'Sullivan in 1839, but was bred in American bones from Jamestown and Plymouth Rock. It inspired Benjamin Franklin to insist the British cede to an independent United States all the land east of the Mississippi. It inspired Washington to speculate constantly in western land. It was an ulterior motive of all who cheered Monroe's Doctrine because if North America was to be off-limits to new foreign colonial claims then

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6. Walter A. McDougall, *Promised Land, Crusader State: The American Encounter With the World Since 1776* (New York: Houghton Mifflin, 1997), and "Back to Bedrock: The Eight Traditions of American Statecraft, *Foreign Affairs* 76, no. 2 (1997), pp. 134-46.

all unoccupied western lands must be grabbed by the United States itself. Finally, the liberty and opportunity that distinguished America could not be passed to future generations without territorial growth.

Washington's Farewell Address, thus, conflated moral and material messages in the manner of Moses' farewell to the Israelites in Deuteronomy. The President promised Americans their nation would surely become what Jefferson called an *Empire of Liberty*, the freest, richest, mightiest nation in history, but *only if* Americans obeyed his commandments to remain united, virtuous, frugal, prudent, and vigilant, insulating their exceptional Promised Land and spreading its blessings to the far boundaries ordained by God. To put it another way, Washington sketched out a grand strategy to transform the loose chain of Atlantic settlements into a continental empire, but *only if* its principles were faithfully followed. They by and large were, for 100 years, which is why the *Oxford History of the United States* volume on foreign relations is titled "From Colony to Superpower," and why I myself concluded that Americans—their present confusion aside—are indeed capable of grand strategy.[7]

An Excursus on the Connotations of 'Empire'

But before examining that strategy in operation, permit me a brief excursus regarding a question relevant both to history and contemporary debate. How did late eighteenth century Anglo-American statesmen understand the word "empire"? What did they mean to connote when they used it themselves? Americans always boasted that their nation was born in a revolt *against* empire, and have wanted to believe—usually with good reason—that the United States opposes colonial empires like the British or French or ideological empires like the Nazi or Soviet. Yet after the Cold War and especially since 9/11 the notion has been advanced that an American empire would be a positive good. An unnamed member of the George W. Bush administration bragged after the invasion of Iraq, "We're an empire now, and when we act, we create our own reality."[8] Foreign policy intellectuals, such as William Kristol and Robert Kagan, called for American exercise of a "benevolent hegemony," and others, such as Andrew Roberts, Niall Ferguson, and Max Boot, suggested it was high time the United States accepted the fact that it bore imperial responsibilities like those of Victorian Britain. Pundits both for and against have published scores of books and articles on the theme of American empire.[9] Should we feel more comfortable with that notion after learning that Jefferson, Franklin, and other Founders

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7. See George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (Oxford University Press, 2008), and Walter A. McDougall, Can America Do Grand Strategy?" *Orbis: A Journal of World Affairs,* Spring 2010, pp.165-184.

8. Quoted by Ron Suskind, "Faith, Certainty and the Presidency of George W. Bush," *New York Times Magazine,* October 17, 2004.

9. See Richard H. Immerman, *Empire for Liberty: A History of American Imperialism From Benjamin Franklin to Paul Wolfowitz* (Princeton University Press, 2010).

referred to America as an embryonic empire?

The answer is "no," because what they had in mind was not even remotely akin to the global alliances, military bases, and interventions that the United States has engaged in almost nonstop since 1941. The word "empire" meant one of three things to our Founders. The obvious first usage was autocratic rule by a capricious emperor who crushed the liberties of his subjects and exploited them in pursuit of power and glory. Americans abominated *that* sort of empire. A second usage simply connoted a vast region larger than the typical European kingdom and singled out for some characteristic. It might be political, as in the cases of the Chinese, Ottoman, or Holy Roman empires, or Athenian, Roman, and modern Venetian republics in their expansive heydays. But the defining characteristic might just as well be spiritual or economic. That is the sense in which Jefferson invoked the Empire of Liberty, and William Henry Seward meant when he spoke of an empire on the oceans to be won by "the twin gospels of Christ and commerce." The third meaning of empire in Early Modern English, however, connoted a very specific identity in law and philosophy: to wit, *utter, untrammeled sovereignty*. When Henry VIII broke with the papacy—a milestone in the history of liberty in the minds of the American Founders—he bade the Parliament pass a formal statute declaring "this realm of England is an Empire," meaning a realm subject to no superior temporal or spiritual authority on the face of the earth. The Founders and Constitutional Framers assuredly held that when the Continental Congress in turn broke with the English crown it was declaring the new nation an empire in this sense of "utterly sovereign." Indeed, Washington gave eloquent voice to that sense in his last general orders to the Continental Army on April 18, 1783:

> For, happy, *thrice* happy, shall they be pronounced hereafter, who have contributed anything, who have performed the meanest office; in erecting this *stupendous fabric of freedom and empire on the broad basis of independency*; who have assisted in protecting the rights of human nature, and establishing an asylum for the poor and oppressed of all nations and religions.[10]

In short, the American empire Washington and Jefferson imagined was not the sort advocated by those who imagine Washington a "neocon" and America in 1776 already a "neocon nation," dangerous to all tyrants around the world.[11] That was how Robespierre's Jacobins and Lenin's Bolsheviks would define their regimes, which is why they expected their monarchical and capitalist enemies to attempt to crush their revolutions before they could spread. But American revolutionaries (even Tom Paine, if you read *Common Sense* carefully) contemplated no republican crusades overseas. The Founders were not even confident their own citizenry could summon the wisdom and virtue needed to preserve

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10. Washington's celebratory general orders followed by just over a month the famous Newburgh Address with which he defused a mutinous conspiracy among disgruntled officers. See: http://democraticthinker.wordpress.com/2010/01/10/newburgh-crisis-viiicessation-of-hostilities

11. See Robert Kagan, *Dangerous Nation* (Knopf, 2006), and "Neocon Nation: Neoconservatism c. 1776," in *World Affairs,* Spring 2008.

their republic. (Aaron Burr gave the Constitution 50 years before it succumbed to monarchy.) In any event, Americans could hardly have been proto-"neocons," impatient to export their system because they had just ratified a Constitution that *inhibited foreign adventures* through its division of powers and contained *no instructions at all regarding the use of those powers* except, of course, to "preserve, protect, and defend the Constitution of the United States."

The Constitutional Silence on Foreign Policy: What Were the Framers Thinking?

Wait a minute! If America's survival, destiny, and Providential mission relied so heavily on wisdom and prudence in her foreign relations, and the willingness of her new Chosen People to obey the law handed down by their new Moses in his Farewell Address, why then did the Framers not include instructions and warnings to that effect in the Constitution? Were they naive, absent-minded, or oblivious to the importance of foreign policy and defense? Of course not. It was the very impotence of the Articles of Confederation to command foreign respect for American sovereignty that moved Federalists such as Madison, Hamilton, and Washington to convene the Constitutional Convention in the first place. Moreover, the first thirty articles in *The Federalist Papers* urged ratification on foreign policy grounds. Yet when we look at the Constitution itself, all we find are those few, familiar clauses in Article I, Section 8, which grant Congress power to (1) regulate foreign commerce; (2) define and punish piracy on the high seas; (3) declare war; and (4) raise and support armies for no more than two years at a time, provide for a navy; and call up state militias in need. Article II, Section 2, is sparer still, simply granting the President power to (1) serve as Commander-in-Chief; (2) appoint ambassadors with advice and consent of the Senate; and (3) make treaties with consent of two-thirds of Senators present.

That's all. No one is delegated authority to make or execute foreign policy. No mention is made of a power to recognize or de-recognize foreign regimes, terminate treaties as opposed to make them, make peace as opposed to war, declare neutrality in the wars of others, annex or cede territory, bestow or deny foreign aid, impose sanctions, regulate immigration and the status of aliens, proclaim Great Rules like Washington's or Doctrines like Monroe's, or for that matter prescribe or proscribe any specific diplomatic behavior at all.

What were the Framers thinking? I believe they were thinking just what we would expect them to think if we study the political and intellectual history of their time and place, the political and intellectual history they themselves studied, and of course their own highly articulate arguments. The only people who may be surprised by their thinking are those who imagine America's Founders to have been disembodied demigods obeying the dictates of universal natural law and designing an instrument to impose them on all humanity—in other words, people who think America's Founders were indeed akin to Jacobins. They were not. As the very first sentence of Forrest McDonald's great book on the subject states: "The Framers of the Constitution were, for the most part, intensely practical men who were skeptical, even contemptuous, of abstract schemes of political

theory."[12] The Framers were not Neo-Platonists, Thomists, Kantians, Rousseauians, or proto-Straussians. They were Anglo-Americans steeped in the Common Law, Protestant theology, the Scottish and English Enlightenments, and not least the failures of other republics ancient and modern. They meant to fashion a government able to defend the United States whatever that might require, hence they left its foreign policy powers vague and elastic. But they also meant to fashion a government whose powers would not threaten their own liberty. So they separated the powers to raise and command armies, to make and wage war.[13]

The lessons of history, not least the War of Independence itself, persuaded Federalists of the need for a single robust executive to execute foreign relations and command the military. Sound philosophy supported that judgment. John Locke considered executive prerogative to include "the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the Commonwealth." The alternative, he warned, must be "disorder and ruin." Montesquieu praised the unwritten British constitution that deemed domestic policy primarily the business of the legislature and foreign policy of the executive. Sir William Blackstone's voluminous commentaries on the Common Law found ample precedent for the Crown's exclusive authority over war and diplomacy so long it was exercised for the public good in a constitutional manner. But Americans also identified strongly with Britain's counter-tradition, the "Country Party" or Whig philosophy that damned executive caprice and upheld Parliamentary supremacy and cabinet government. Even Alexander Hamilton, who insisted that foreign affairs be "executive altogether" in the interest of unity, secrecy, decisiveness, dispatch, and intelligence, nonetheless conceded in Federalist No. 75 that the "history of human conduct does not warrant that exalted opinion of human virtue which would make it wise to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of ... a President of the United States." Abraham Lincoln would echo this wisdom when he noted the Framers "resolved to so frame the Constitution that *no one man* should hold power of bringing this oppression

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12. McDonald, *The American Presidency*, p. 9.

13. The contrast with Jacobinism is elaborated by Claes G. Ryn, *America the Virtuous: The Crisis of Democracy and the Quest for Empire* (Transaction, 2003). Needless to say, the classic contrast between the ideologies of the American and French revolutions is Edmund Burke, *Reflections on the Revolution in France* (1790). My own understanding of the intellectual origins of American Constitutional thought rests on classic historical accounts including J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton University Press, 1975); Bernard Bailyn, *The Ideological Origins of the American Revolution* (Harvard University Press, 1992); Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, Inc., 1996); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (The University of North Carolina Press, 1998); Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (University Press of Kansas, 1985); Richard R. Beeman, *Plain, Honest Men: The Making of the American Constitution* (New York: Random House, 2009); and my own *Freedom Just Around the Corner: A New American History 1585-1828* (New York: HarperCollins, 2004).

upon us."[14] James Madison was sufficiently worried about executive malfeasance that he wanted all residual or implied Constitutional powers to rest with Congress. In sum, the office of American President was a novelty and the intentions or expectations of the Framers regarding its evolution cannot be fully guessed. All we can be sure of is that nobody wanted to court executive tyranny, be it that of a monarch like George III or demagogue like Oliver Cromwell.

Otherwise, the Constitution bequeathed to the nation a malleable mix of powers either assigned or imputed to the President, or to the President *cum* Senate, or to Congress, with endless opportunities for disputes which the judicial branch has adamantly refused to umpire. Driven by what Henkin calls some "uncertain blend of patriotism with judicial humility," the courts ever since John Marshall have ritually bowed to increases in executive war powers. But it would be mistaken to conclude that all is strife between Congress and the President in foreign affairs. Aside from the common devotion to the national interest both branches presumably feel, and the common interest they share if the President and Congressional majority are of the same party, there operates a brilliant Constitutional serendipity. The very separation of powers almost always obliges the branches to cooperate just to get anything meaningful done. So even though American history blushes with examples of political discord thwarting effective foreign policy, it boasts even more examples of collaboration or at least toleration between branches.

Nevertheless, patterns can be discerned over time, including a cyclical one traced by eras of relative Congressional or executive energy and predominance in foreign relations. For instance, President Washington attenuated somewhat the Senate's influence over the making of treaties, but the Senate retaliated by attaching to treaties various amendments such that on 43 occasions since 1789 the President himself has rejected the final result. Likewise, from 1815 to 1869 the uppity Senate rejected 31 of 220 treaties and amended 80 percent of the rest. The most famous antagonist in a treaty fight, Senator Henry Cabot Lodge, later defined a diplomatic text sent to the Senate as "not properly a treaty but merely a project."[15]

Still, the most imposing long-range trend is unquestionably the accretion of executive powers as serial presidents have seized opportunities, exploited crises, or expanded bureaucratic purview in response to new technological, political, and economic complexities. The results of that long-term trend would probably shock the Framers because their initial purpose in naming the President Commander-in-Chief was just to ensure civil supremacy over the military. Yet by the end of World War II, the power of the President had grown so great, in Harry Truman's sarcastic remark, as to make Genghis Khan green with envy.[16] Nevertheless, the road to that result was long and winding, and sometimes doubled back on itself.

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14. David Gray Adler and Larry N. George, *The Constitution and the Conduct of American Foreign Policy* (University Press of Kansas, 1996), p. x.

15. W. Stull Holt, *Treaties Defeated in the Senate* (Johns Hopkins University Press, 1933), p. 179.

16. Clinton L. Rossiter, *The American Presidency* (New York: Harcourt, Brace and Co., 1960), p. 30.

So let us walk, or rather sprint, down that road if only to notice the peaks and valleys Americans encountered during their first century under the Constitution, a century during which their foreign relations were based on coherent, mutually reinforcing principles. These principles permitted the nation to grow with phenomenal speed into a potential world power, but one whose greatest source of strength was her exceptional liberty under law at home.

Constitutional Government Passes Four Tests and Survives a Secession

In retrospect, that original U.S. grand strategy succeeded because the legislative and executive branches passed four tests, with mostly flying colors, in foreign policy, that enabled the nation to expand to the Pacific with the Constitution intact.

None of them happened on George Washington's watch because he sent no U.S. forces into combat abroad. John Adams did when the French Republic, drunk with victories in Europe and angry about Jay's Treaty with Britain, attacked U.S. merchant ships in 1798. The sturdy frigates of the young U.S. Navy paid the French back with interest in this Quasi-War until the Treaty of Mortefontaine of 1800 ended the combat, not to mention the Franco-American alliance dating from 1778. It is important to note that America's first conflict was both an undeclared war and a limited war. But it posed no Constitutional test because it was a cooperative effort on the part of the President and the Congress. To be sure, the Jeffersonian party vilified Adams for waging war against a sister republic and using it as a pretext to restrict civil rights. But Congress authorized the hostilities through a dozen legislative acts, while the Alien and Sedition Acts were precisely that: Acts of Congress. Finally, the Supreme Court established its hands-off precedent by ruling it all constitutional. It reasoned that if Congress had the power to declare general war, then *a fortiori* it could authorize limited war.

Jefferson, political posturing aside, agreed with the Federalist precedents. His inaugural address echoed Washington's call for unity by instructing the American people that "we are all federalists; we are all republicans." His first foreign initiative echoed Adams when on May 15, 1801, his cabinet decided to dispatch a naval squadron to punish the Barbary Pirates. He did not think he needed Congressional assent for a mission of self-defense, but nonetheless requested and got multiple statutes to support the campaign.

What posed the first serious Constitutional test in U.S. foreign relations was the danger posed by Napoleon's ambition to carve out an empire on the Mississippi River and the likelihood that the only way the United States could prevent it was by war or by purchase. Jefferson wondered whether the Constitution permitted acquisition of new territory, especially without the consent of its inhabitants. But he had to act quickly and sort out the legalities later. So, he sent James Monroe and Robert Livingston to Paris to bid up to $10 million for New Orleans. When the French instead offered all of Louisiana for $15 million, the Americans leapt at the bargain. What they brought home was not strictly a treaty. It could even be deemed a receipt for stolen goods since Napoleon had pried Louisiana from Spain. But despite—or because of— the irregularities Jefferson sent it to the Senate where, after serious debate, he won a two-thirds majority. It was a high-wire act

and no mistake, but a splendid example of how a president could both take initiative now *and* defer to Congress later when it served the national interest.

Jefferson's Embargo of 1808 did not. By way of protesting the British and French economic blockades that interfered with neutral rights at sea, Jefferson ordered his party's Congressional majority to pass a law prohibiting Americans from engaging in foreign trade. This wrecked the economy and so embarrassed the Democratic Republicans that by 1812 their western and southern factions, the so-called War Hawks led by John Calhoun and Henry Clay, beat the drums for a declaration of war against Britain. This posed a second critical test because it exposed the country to attacks that included the burning of Washington, D.C., risked the loss of New Orleans and the entire West, and threatened the very unity of the nation because Federalist opponents of the war in New England spoke of secession. Finally, the federal government under James Madison showed itself woefully ill-prepared to wage or even finance the war. But the war ended well inasmuch as Andrew Jackson's victory at New Orleans saved the Louisiana Purchase and the Democrats learned that the Federalists had been right to insist on the need for a professional military and national bank.

Enter John Quincy Adams, who deserves a whole lecture to himself.[17] Pious, prudent, and ethical, Monroe's Secretary of State believed the United States was destined to absorb all North America because now no power could stand in the way. But Americans would become their own worst enemy if they succumbed to passion and either fractured the Union or else charged off on ideological crusades. Thus, when some Congressmen urged Monroe to assist the Latin American juntas rebelling against Spain, Adams chose a Fourth of July oration in 1821 to deliver a thunderous rebuke:

> [America] goes not abroad in search of monsters to destroy. She is the well-wisher to the freedom and independence of all. She is the champion and vindicator only of her own.... She well knows that by once enlisting under other banners than her own, were they even the banners of foreign independence, she would involve herself, beyond the power of extrication, in all the wars of interest and intrigue, of ... avarice, envy, and ambition, which assume the colors and usurp the standard of freedom. The fundamental maxims of her policy would insensibly change from liberty to force. The frontlet upon her brows would no longer beam with the ineffable splendor of freedom and independence; but in its stead would soon be substituted an imperial diadem, flashing in false and tarnished lustre the murky radiance of dominion and power. She might become the dictatress of the world: she would be no longer the ruler of her own spirit.

Thus, did John Quincy Adams give fulsome expression to true American Exceptionalism.

He was also a shrewd and flexible agent of Unilateralism, the American System, and Expansion. When militia colonel Andrew Jackson pursued hostile Indians into Spanish

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17. The literature on John Quincy Adams is deservedly immense, but an excellent short summary of his views on statecraft is Greg Russell, *John Quincy Adams and the Public Virtues of Diplomacy* (University of Missouri Press, 1995).

Florida in 1816 and executed two British gun-runners there, Adams drafted a stinging brief *indicting* Spain and Britain and threatening to seize Florida if the Spaniards would not sell it. He then negotiated the Transcontinental Treaty of 1819, in which the United States acquired Florida, and Spain's claims to the Oregon Territory were disputed with Britain and Russia.

Finally, Adams guided the federal government through its third critical test in foreign affairs when he crafted the Monroe Doctrine. After the Napoleonic wars, the King of Spain talked of reconquering Mexico and South America. Adams was not upset by that crazy scheme, but was greatly upset by a gratuitous offer of an Anglo-American partnership to prevent a Spanish expedition. The Royal Navy did not need U.S. help. Why would the British tempt Americans with such a *demarche* unless their ulterior motive was to curb *U.S. expansion* in the Western Hemisphere? So Adams waged a lonely battle in the cabinet and public opinion to persuade President Monroe to issue a unilateral declaration in his 1823 Annual Message to Congress. That was a big leap forward for the executive branch, because Monroe's Doctrine was *declared* to Congress, not submitted for approval. But since the President did not ask Congress to vote any funds or risk any conflict no one objected. (Congress has usually been happy to cheer bold words that require no action.) The Monroe Doctrine was, thus, a grand bluff based on the military power an aroused United States might potentially raise against an imperial threat. But Adams' bluff worked because the Russians and British promptly agreed to treaties that recognized U.S. claims to the Oregon Territory. In 1841 President John Tyler even draped the Monroe Doctrine's mantle over the Sandwich Islands (Hawaii) when the Royal Navy threatened their independence.

Clearly, U.S. expansionism had a long history when a Jacksonian Democrat editor sanctimoniously christened it Manifest Destiny in 1839. The reason he did so was to make America's westward march seem to be God's will, thereby obscuring the fact that the hoped-for annexation of Texas, New Mexico, and California faced serious political and perhaps Constitutional barriers. First, the territories in question were provinces of the Republic of Mexico (even though Anglo-Texans declared independence in 1836 and the Californios were virtually autonomous). Second, Jackson and his successors could not annex the Republic of Texas by treaty because they could not get a two-thirds vote for it in the Senate. Third, Texas was slave country, so its acquisition would spark a sectional crisis. If Manifest Destiny was not to be thwarted, therefore, some Manifest Design was in order. First, President Jackson recognized the Republic of Texas on his last day in office in 1837. Then President Tyler slipped annexation through Congress in 1845 by means of a joint resolution that required only simple majorities. Such an expansion of slavery by dubious means prompted John Quincy Adams to call it the apoplexy of the Constitution. Finally, President James K. Polk, a Tennessee Jacksonian known as "Young Hickory," meant to take California by force lest the British navy plant the Union Jack there first. He used the good old American ploy of maneuvering the enemy into firing the first shot. In 1846, when Mexican soldiers contested General Zachary Taylor's advance to the Rio Grande, Polk had his *casus belli*. Claiming "American blood has been spilled on American soil," Democrats closed off debate over a declaration of war, and Whigs dared not protest lest they suffer the fate of the Federalist Party that had opposed war in 1812.

This was expansionism of a different sort insofar as a President used his war powers

to station troops in harm's way and present Congress with a *fait accompli*. Frustrated opponents suspected a conspiracy to expand slavery, but their legislative protests, including the Proviso proposed by Congressman David Wilmot (D., Penna.) and Spot Resolutions of Congressman Abraham Lincoln (W., Ill.) hung fire. When in 1848, Nicholas Trist brought home the Treaty of Guadalupe Hidalgo with its Mexican Cession, opponents in the Senate were obliged to ratify lest their opposition prolong a war they despised. The precedent was scary, as Lincoln told law partner William Herndon:

> Allow the President to invade a neighboring nation whenever he shall deem it necessary to repel an invasion, and you will allow him to do so whenever he may choose to say he deems it necessary for such purpose, and you allow him to make war at pleasure.... If to-day he should choose to say he thinks it necessary to invade Canada to prevent the British from invading us, how could you stop him? You may say to him, 'I see no probability of the British invading us'; but he will say to you, 'Be silent. I see it, if you don't.'

The conquest of California, and 1846 Oregon Treaty with Britain, realized America's coast-to-coast destiny. But the way it had been achieved caused cooperation in foreign affairs to dissolve. After the falsely named Compromise of 1850, the sectional breach grew so wide that the North and South began to pursue their own foreign policies. Democrats trolled for chances to annex new slaveholding territories in the Caribbean. Whigs looked to expand Yankee trade, for instance, by opening Japan in 1853. The rise of the Republican Party, fracture of the Democrats, election of Lincoln in 1860, and Southern secession completed the schism in what I call the "American Civil Religion." Two versions of the American Creed waged what, in the eyes of both, was a holy war. But however one apportions the blame, fracturing the Union was the unforgivable sin against the Holy Spirit because the "United" States could never fulfill God's plan if they ceased to be united. Secession risked all the strategic traditions on which America's greatness depended. For if two or more rival nations emerged on their soil, Americans would confront a security dilemma that would all but oblige them to play balance of power, seek foreign allies, and undermine all the peculiar advantages identified in Washington's Farewell.

Foreign policy was also critical to the outcome of the Civil War because the Confederate strategy, consciously modeled on that of Washington and the Continental Army, counted on foreign assistance, whereas Lincoln and Secretary of State William Henry Seward strove to keep Britain and France neutral. Congress was often an unhelpful ally in war and diplomacy alike, because the Radical Republicans who inherited a majority when the Southerners left town were impatient, hypercritical, and ideological. Most did not understand the diplomatic delicacy required by the declaration of a Union blockade with no standing under international law. Most bristled when Lincoln and Seward avoided a war with Britain over the *Trent* Affair by releasing two Confederate agents the Union navy had seized on a British ship. Most telling, perhaps, was an amusing *contretemps* that occurred in 1864 when members of Congress made inflammatory remarks about Napoleon III's occupation of Mexico. The French minister dropped by the State Department to express indignation, prompting Seward to assure him that Congress did not speak for the United States. The remark was leaked, whereupon the House of Representatives unanimously resolved "that Congress has a Constitutional right to an authoritative voice in declaring and

prescribing the foreign policy of the United States ... not less in diplomatic negotiations than in the use of national forces when authorized by law; and the propriety of any declaration of foreign policy by Congress is sufficiently proved by the vote which pronounces it."[18] Thus, did Congress signal a postwar assertiveness in foreign policy that would parallel its assertiveness vis-à-vis Andrew Johnson on Reconstruction.

Facile surveys that read history backward often describe the Civil War as the final preparation for America's role as global champion of freedom because it saved, purified, and mobilized the nation, while Reconstruction in the South amounted to the first U.S. nation-building project. But that is not how Lincoln saw matters. To him, the great stake in the Civil War was not the fate of democracy *everywhere*, but rather the fate of self-government *anywhere*. For if Americans' own republic failed, then other peoples were unlikely to risk the experiment. That is why he called the United States "the world's last, best hope."[19] Nor was America ready for world power, at least not in the manner it was after 1898, because the executive branch went into retreat again after 1865, Congress vigorously reasserted itself, both reaffirmed faith in the traditional foreign policy creed, and the Army and Navy shrank to the modest numbers needed for Indian fighting and coastal defense. Even expansion went on hold after 1867, when a penurious, skeptical Senate just barely ratified Seward's purchase of Alaska, and the Russian ambassador had to bribe some members of the House to authorize the $7.2 million.

That does not mean that the United States withdrew into isolation. Indeed, the last decades of the nineteenth century were the era when its exports flooded world markets and American scholars, tourists, missionaries, and merchants began turning up everywhere. Those were the decades when the United States helped draft conventions to regulate international shipping, postal service, telegraphy, time zones, and commercial law. The White House and State Department simply kept a low profile in those peaceful decades, and the American people were reassured when, for instance, Grover Cleveland promised in his 1885 inaugural address scrupulously to avoid

> any departure from that foreign policy commended by the history, the traditions, and the prosperity of our Republic. It is the policy of independence, favored by our position and defended by our known love of justice and by our power. It is the policy of peace suitable to our interests. It is the policy of neutrality, rejecting any share in foreign broils and ambitions upon other continents and repelling their intrusion here. It is the policy of Monroe and of Washington and Jefferson – Peace, commerce, and honest friendship with all nations; entangling alliance with none.

But that same year a book appeared called *Congressional Government* that damned the powers of Congress and restraints on the President. The author, a professor of political science, advocated amending the Constitution to make the President a sort of prime

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18. *Congressional Globe*, 38th Cong., 2d Sess. (1864).

19. Michael Burlingame is especially persuasive on this score, for instance in his recent biography *Abraham Lincoln: A Life* (Johns Hopkins University Press, 2008).

minister uniting legislative and executive power. His ideas were little noticed outside the ivory tower. But American society and world politics were in rapid flux, and within just 15 years the challenges mounted by industrialism and imperialism called into being the activist presidency longed for by Professor Woodrow Wilson.

PART II: THE SECOND AMERICAN CENTURY AS CRUSADER STATE

1898: The March of the Flag and the White Man's Burden

On September 16, 1898, Senator Albert J. Beveridge delivered a ringing keynote to Indiana's Republican convention. He spoke just a month after the truce in the Spanish American War left U.S. forces occupying Manila in the Philippines, Guam in the Marianas, and Puerto Rico in the Caribbean, in addition to the Hawaiian Islands, annexed by a joint resolution of Congress, and Cuba, whose independence was their putative war aim. The question before the McKinley administration, the Senate, and voters in the midterm elections was whether the United States should, would, or could retain these conquests.

Beveridge couched his appeal in the evangelical rhetoric that resonated with mainstream Americans. He asked why God had made of the United States

> a greater England with a nobler destiny.... Have we no mission to perform, no duty to discharge to our fellow man? Has the Almighty Father ... marked us as the people of his peculiar favor, merely to rot in our own selfishness, as men and nations must, who take cowardice for their companion and self for their Deity...? The Opposition tells us that we ought not to govern a people without their consent. I answer, the rule of liberty that all just government derives its authority from the consent of the governed, applies only to those who are capable of self-government. We govern the Indians without their consent, we govern our territories without their consent, we govern our children without their consent. How do they know that our government would be without their consent? Would not the people of the Philippines prefer the just, humane, civilizing government of this Republic to the savage, bloody rule of pillage and extortion from which we have rescued them?

Thus, did Beveridge instruct Americans that far from feeling guilty about imperialism, they ought to feel guilty only if they spurn it! That same year, Rudyard Kipling sent his poem "The White Man's Burden" to Theodore Roosevelt with the same object in mind: to shame the United States into becoming an imperial power! Beveridge's boldest appeal was to precedent:

> And, now, obeying the same voice that Jefferson heard and obeyed, that Jackson heard and obeyed, that Monroe heard and obeyed, that Seward heard and obeyed, that Grant heard and obeyed, that Harrison heard and obeyed, our President to-day plants the flag over the islands of the seas, outposts of commerce, citadels of national security, and the march of the flag goes on![20]

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20. The entire text is posted at http://www.historytools.org/sources/beveridge.html. I am embarrassed to confess that my book *Promised Land, Crusader State*, pp. 101-2, misdates the speech. I evidently conflated the 1898 "March of the Flag" address with Beveridge's 1900 "In Support of an American Empire" speech. Happily, the error is irrelevant to my argument, which is the sharp contrast between the spirit, if not always the substance, of Progressive Imperialism and that of all previous U.S. foreign policy traditions.

Invitations to World Power: A Muscular New America in a Suddenly Shrinking World

What a contrast to Grover Cleveland's 1885 inaugural that foreswore foreign entanglements and acquisitions in allegiance to Washington's Great Rule and the Monroe Doctrine! How to explain so sudden and thorough a shift? First, we can observe that the shift was not all that sudden. It occurred over two decades, roughly 1876 to 1896, during which time the global strategic and economic environments were transformed, and the United States adjusted by building a modern steel navy, scouting out bases in the Pacific, and competing for markets around the world. The Cuban revolt against Spain proved the occasion for America's exertion of world power, but her potential for it was obvious. The U.S. population had reached 71 million, greater than any European country save Russia. U.S. agriculture was so bountiful that its exports undersold European producers in their own countries. U.S. coal production matched Britain's and its steel output doubled that of second-place Germany. In addition, U.S. technology and enterprise made its firms world leaders in chemicals, electricity, petroleum, mass marketing, and soon internal combustion. But their very success caused business and government leaders to fret about overproduction, hence the need to penetrate new markets abroad. Likewise, the closing of the frontier, announced by Frederick Jackson Turner in 1893, implied that America needed to pioneer new frontiers overseas if freedom and opportunity were to pass to new generations. Likewise, new waves of immigrants, including Catholics and Jews from southern and eastern Europe, made American society vastly more cosmopolitan, but also anxious about the assimilation of "hyphenated Americans" with dual loyalties.

Most of all, those were the decades of the New Imperialism when not only Britain and France, but Germany, Italy, Russia, Spain, Portugal, Belgium, and Japan carved out colonial empires in Africa, Asia, and Oceania, and competed to build blue water navies. The world shrank and Americans noticed. In 1890, Secretary of the Navy Benjamin Tracy persuaded Congress to fund a modern, two-ocean fleet, and Captain A. T. Mahan published *The Influence of Sea Power on History*. Mahan would popularize a new term to disparage opponents of overseas acquisitions when he claimed, "I am an imperialist simply because I am not isolationist."[21] In 1894, even the stodgy Cleveland administration breathed fire when the British seemed to challenge the Monroe Doctrine in a dispute with Venezuela. Secretary of State Richard Olney proclaimed: "Today the United States is practically sovereign on this continent and its fiat is law upon the subjects to which it confines its interposition."[22] That same year the treaty ending the first Sino-Japanese War granted Tokyo dominance over Korea, Manchuria, and the Ryukyus. The European powers hastened to carve out their own concessions in the decrepit Qing Empire that, in turn, would inspire the American Open Door policy.

Finally, the executive branch, while mostly passive in the late nineteenth century,

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21. James C. Bradford, ed., *Admirals of the New Steel Navy* (Naval Institute Press, 1990), p. 42.

22. Dispatch to London, July 20, 1895: *Foreign Relations of the United States 1895* (G.P.O., 1948), pp. 545-62.

had been growing in size and competence to cope with the problems of an urban, industrial society. The courts blessed accretions of executive power, not least through a recondite 1890 decision, *In Re Neagle*. The case turned on whether a federal marshal, assigned as bodyguard to a Supreme Court Justice, was subject to prosecution by the State of California for having shot a suspicious, but innocent man. The Court granted *habeas corpus* to agent Neagle on the grounds that the Constitution endowed the executive branch with power to do whatever was needed to enforce "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of government under the Constitution." Theodore Roosevelt would invoke this "stewardship theory" to claim extra-Constitutional powers, especially under the "pressures of international relations."[23]

Cuba Libre! Americans' First Foreign Crusade

Given those powerful trends, it would seem a more assertive U.S. posture in foreign affairs was over-determined. But defense of the Monroe Doctrine was not new, nor efforts to expand U.S. trade in Asia, nor spurts of naval construction, nor acquisitions of non-contiguous territory (viz., Alaska and Samoa). No, the truly shocking novelty after 1898, the one that explains the Beveridge's ecstatic rhetoric, was the moral pretension that America had a mission to uplift the Cubans and Filipinos. That is: "What most historians have labeled new and bad about American policy in 1898 was in fact old and good, and what most think was traditional and good about it was in fact new and dangerous."[24] For the first time in their history, Americans succumbed to the temptation to assert that they had the power, wisdom, charity, patience, right, and duty to rule over foreigners until they were judged mature enough for self-rule.

America now has such a long and checkered history with nation-building that

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23. The passage in question is quoted by Fareed Zakaria, *From Wealth to Power: The Unusual Origins of America's World Role* (Princeton University Press, 1998), p. 137. For the entire fascinating opinion, see http://supreme.justia.com/us/135/1/case.html

24. McDougall, *Promised Land, Crusader State*, p. 102. The conclusion drawn by Kenneth Moss, *Undeclared War and the Future of U.S. Foreign Policy* (Johns Hopkins University Press, 2008), pp. 218-19, lends gratifying support to my interpretation of America's transition from Promised Land to Crusader State. The Founding Fathers, he writes, would acknowledge the place of military force in national security and foreign policy generally. However, they would be appalled that military force has become the most visible instrument of foreign policy, and that the president enjoys a virtual carte blanche to wield it in the absence of Congressional oversight. When did the great, gradual drift toward presidential prerogative begin? Almost all accounts trace it to the early Cold War, noting that Congress has not used its war powers since 1941. "Yet the real foundation for expanded presidential use of military force occurred at the beginning of the twentieth century. It corresponded to a global expansion of U.S. interests and the rise of a conviction that the United States could use military force to improve the world as well as protect and serve its interests. The gap between Theodore Roosevelt's world policeman and George W. Bush's desire to transform and stabilize the Middle East is not very wide, especially when the bridge is a Wilsonian idealism that believes in the universal appeal of American political ideals and values."

advocates easily dupe their audiences (and perhaps even themselves) into believing the United States has *always* been about humanitarianism, foreign aid, and the spread of democracy. But it isn't so. The federal government began to play Crusader State during a discreet era—the Progressive Era—when it also greatly expanded its regulation of domestic life, not least in heavily immigrant urban slums. Progressive Imperialism was really the external expression of the same spirit driving internal reforms, which explains why most leading Progressives were imperialists and vice versa. Herbert Croly, founder of *The New Republic*, even thought the Spanish American War launched the Progressive Era because of its "tremendous impulse to the work of reform."[25]

Moreover, the Progressive Era, like all previous reform eras in American history, had a strong religious component, and that of the late nineteenth century—the muscular Christianity of the Social Gospel movement and the missionary societies—took it as articles of faith that America has a divine mission to uplift the downtrodden abroad as well as at home. The Reverend Josiah Strong's best-selling books even combined Social Gospel with Social Darwinism, ascribing to the American race, "the representative, let us hope, of the largest liberty, the purest Christianity, the highest civilization," a destiny to dispossess, assimilate, or mold all weaker races "until, in a very true and important sense, it has Anglo-Saxonized mankind."[26] Such messianic pretensions on behalf of one's nation would have struck previous generations of preachers and statesmen as idolatry. But as Arthur Schlesinger, Jr., observed, when American Protestantism turned liberal in the late nineteenth century, "shucking off such cardinal doctrines as original sin, one more impediment was removed to belief in national virtue and perfectibility."[27]

The Spanish American War is of compelling interest for all sorts of reasons. It should not be forgotten that its origins lay, not in some imperialist plot, but in Cuba's struggle for independence and Spain's brutal counterinsurgency ninety miles off the Florida coast. Neither Cleveland nor McKinley wanted to wade into the bloody morass, but the latter came under increasing pressure from a jingoist war party, the Hearst newspaper publicity about Spanish atrocities (the "CNN effect" of that day), and the outcry over the mysterious explosion of the *U.S.S. Maine* off Havana. So a reluctant President, not unlike Madison in 1812, asked Congress to decide whether to authorize U.S. "intervention." It was only when Spain accused the United States of aggression that Congress declared formal war by 311 to 6 in the House and 42 to 35 in the Senate. McKinley insisted the nation's motives were humanitarian and the Platt Amendment foreswore any U.S. designs on Cuba itself. (Some Cuban-American historians argue that, in fact, the American motive was to supplant

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25. Robert Dallek, *The American Style of Foreign Policy: Cultural Politics and Foreign Affairs* (Knopf, 1983), p. 30. See also Herbert Croly, *The Promise of American Life* (Bobbs-Merrll Company, 1965 <1909>).

26. Josiah Strong, *Our Country: Its Possible Future and Present Crisis* (1885), quoted in Julius W. Pratt, *Expansionists of 1898* (Johns Hopkins University Press, 1936), p. 6.

27. Arthur M. Schlesinger, Jr., *The Cycles of American History* (Boston: Houghton Mifflin, 1986), p. 17.

Spanish suzerainty with its own to *prevent* the emergence of a genuine *Cuba Libre*.)[28]

The fact that the United States ended up keeping some Spanish colonies made it seem like the nation betrayed its ideals. An Anti-Imperialist League arose in June 1898 to contest annexationists. McKinley agonized over whether to raise the Stars and Stripes over the Philippines. To improve chances of treaty ratification he wisely named three senators to the U.S. peace delegation, but even so the debate was warm and the vote was close. That infuriated Teddy Roosevelt, who groused that some "evidently consider the prerogatives of the Senate as far more important than the welfare of the country."[29] In the end, the Senate ratified only because several opponents of colonies were loath to prolong the state of war.

The real aberration of 1898, however, was not overseas expansion per se, but rather the imposition of American rule over foreigners to whom they had no intention of granting statehood. The intent was benign paternalism as Senator Knute Nelson (R., Minn.) boasted: "Providence has given the United States the duty of extending Christian civilization. We come as ministering angels, not despots."[30]

That is a measure of how far the nation had drifted from the wisdom of James Madison in Federalist No. 51: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."[31] Now Americans were told they were called to govern others without controls and without their consent. The Supreme Court approved. In six landmark cases of 1901 the Court's so-called "Insular Decisions" held that the Constitution did not necessarily follow the flag, hence unincorporated territories possessed no rights beyond what Congress was pleased to grant them.[32]

The Crusader State's New Diplomatic Traditions

I have dwelt at length on the Spanish American War because it illustrates when, how, and why a new America in a new environment began to invent new diplomatic

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28. See Louis A. Perez, Jr., *The War of 1898: The United States and Cuba in History and Historiography* (University of North Carolina Press, 1998).

29. W. Stull Holt, *Treaties Defeated in the Senate* (Johns Hopkins University Press, 1933), p. 178.

30. http://www.lawzone.com/half-nor/nelson.htm

31. *The Federalist* No. 51.

32. In time Alaska and Hawaii would be incorporated and obtain statehood in 1958 and 1959 respectively. Puerto Ricans were granted U.S. citizenship in 1917 (so they could be conscripted for the Great War) and local self-government in 1952 under a commonwealth status that survives to this day. In the Philippines, the Army had to impose colonial rule through a counterinsurgency campaign that killed 4,000 American soldiers and several hundred thousand Filipinos. The islands were granted a measure of self-government in 1934 and independence in 1946. Guamanians were granted U.S. citizenship in 1950, but remain an unincorporated organized territory.

traditions in order to meet the challenges of a new century. The old ways were still good, but deemed inadequate to an era characterized by a global economy and balance of power, imperial and naval competition, political and technological revolutions, and soon enough, world wars. It now seemed Americans must exert their power and principles overseas to secure themselves at home. Therefore, whereas the Promised Land traditions were meant to deny the world the chance to shape America's future, the Crusader State traditions were meant to afford America the chance to shape the world's future. The first innovation was *Progressive Imperialism*, a nationalist, power-political, but paternalistic response for which the Spanish war provided occasion. The second new tradition was *Wilsonianism*, an internationalist, legal and institutional response for which the two world wars provided occasion. The third was *Containment*, a military and diplomatic response to ideological threats for which the Cold War provided occasion. The fourth tradition was, what I awkwardly term, *Global Meliorism* for which all conflicts provided occasion, but which fully emerged in the Vietnam War. Global Meliorism was based on the notion that American foreign policy must not only treat the symptoms of tyranny, revolution, and war, but address their causes through humanitarian aid, economic development, social engineering, democracy-promotion, and nation-building. These four twentieth century traditions often co-existed uneasily with the inherited nineteenth century ones. More importantly they often clashed with each other because they reflected contrasting theories about *how* to shape the future in various parts of the world.

TR and Wilson: The Warrior and the Priest

Progressive Imperialists recognized that whereas the United States may continue to shun entangling alliances, it could no longer ignore "foreign broils" but must "speak softly and carry a big stick" overseas. They knew that industrialism and imperialism had expanded the European balance into a world balance that the United States had a keen interest in preserving, while guarding its own maritime approaches against all powers. To defend itself in a naval, imperial world the United States must become a naval, imperial power, albeit a "good imperialist" pledged to fight poverty, ignorance, and chaos among the races under its sway.

Thus, Theodore Roosevelt's (TR's) 1904 Corollary to the Monroe Doctrine claimed the right and duty to intervene in what we now call "failed states," and that in the Western Hemisphere it was up to the United States, "however reluctantly, in flagrant cases of such wrongdoing and impotence, to the exercise of an international police power."[33] His motives included the old one of warding off European intervention in the Americas, but also protection of American lives and property and humanitarian peacemaking. That was a far cry from the merely punitive expeditions common since the days of Jefferson and Jackson. Did the President have the power to make the call on when to use such "police power"? The State Department solicitor-general J. Reuben Clark made the case in 1912. He distinguished between intervention in the sense of taking over a country's sovereign affairs (which would require approval of Congress) and interposition to protect lives and property, which could

33. http://en.wikipedia.org/wiki/Roosevelt_Corollary

be done on the authority of the executive. Senator Augustus Bacon (D., Ga.) mounted a forlorn protest. He proposed a bill to deny appropriations to any military deployment made without Congressional assent. But the War Department's counsel carried the day by arguing that the Commander-in-Chief could send troops anywhere to protect the American people and if Congress tried to prevent him then Congress would *hear* from the American people.

In his autobiography published the following year, TR explained his theory of government.

> I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization for it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws.... I did not usurp power, but I did greatly broaden the use of executive power.... I acted ... whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition.... The course I followed [was] of regarding the Executive as subject only to the people, and, under the Constitution, bound to serve the people affirmatively in cases where the Constitution does not explicitly forbid him to render the service.

That prompted the anti-Progressive Speaker of the House Joseph Gurney Cannon (R., Ill.) to observe that Roosevelt had "no more use for the Constitution than a tomcat has for a marriage license."[34] License or not, he got his way almost all the time.

TR's Progressive Imperialism is usually contrasted with Woodrow Wilson's Liberal Internationalism, as in John Milton Cooper's title, *The Warrior and the Priest*.[35] TR is depicted as the realist devoted to power politics in the national interest, whereas Wilson is depicted as the idealist who despised power politics and selfish interest, and in the end waged a "war to end war" and "make the world safe for democracy." The contrast is somewhat overdrawn. Both were Progressive reformers. Both believed in executive energy and cheered in 1898 because war and diplomacy empowered the President. Both engaged in gunboat diplomacy. It was TR who claimed a police power and staged a phony revolution in Panama, but Wilson who sent the marines to Nicaragua and Haiti, bombarded Veracruz, and invaded Sonora on the pretense of "teaching the Mexicans to elect good men." It was TR who sent the Great White Fleet around the world, but Wilson who pledged to build a navy "second to none," even before U.S. entry into the Great War. It was TR who merrily confessed, "I took the Canal Zone, started the canal and let Congress debate me," to which Elihu Root replied, "Mr. President, you have shown that you were accused of seduction and have conclusively proved you were guilty of rape."[36] But it was Wilson who believed so

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34. Nathan Miller, *Theodore Roosevelt: A Life* (William Morrow, 1992), p. 408. For the Cannon quote see: http://en.wikipedia.org/wiki/Joseph_Gurney_Cannon

35. John Milton Cooper, *The Warrior and the Priest: Woodrow Wilson and Theodore Roosevelt* (Harvard University Press, 1983).

36. H. W. Brands, *TR: The Last Romantic* (Basic Books, 1977), p. 488.

deeply that ends justify means that he persuaded Congress to wage a discretionary total war for the utopian program of "a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free."[37] In so doing Wilson became the first president to impose conscription for a foreign war, while suspending civil rights far more than Lincoln had dared.

Where foreign policy and the Constitution are concerned, the real distinction between the two Progressive giants is this; Roosevelt's prudence and sense of proportion bred successes that an otherwise jealous Congress had to acknowledge. Wilson's folly and self-righteous zeal all but obliged the Senate to resist. Moreover, TR, not Wilson, was the first American to win a Nobel Peace Prize (for mediating the Russo-Japanese War). TR, not Wilson, repented of the annexation of the Philippines (our Achilles' heel, he called it); and TR, not Wilson, grew so skeptical of nation-building that he likened annexing the Dominican Republic to a boa constrictor swallowing a porcupine "wrong-end to."[38] In other words, Wilsonianism was less a reaction *against* Progressive Imperialism than a moralistic caricature of it that inflated America's police power and humanitarian duty until they encompassed the whole world. Wilson deemed foreign policies serving merely the national interest to be degrading, and he lectured the Naval Academy that "The idea of America is to serve humanity."[39] Instead of measuring Exceptionalism by what America *was*, Wilson now measured her sanctity by what America *did*. So where TR waged finite struggles in pursuit of tangible goals like a Panama Canal, Wilson waged infinite struggles in pursuit of abstractions like perpetual peace. Like Melville's Captain Ahab in pursuit of the whale, Wilson not only failed, but destroyed himself in the process.[40]

Wilson's specific aims in his "war to end war" were enunciated in his Fourteen Points Speech of January 1918. They included open diplomacy, freedom of the seas, free trade, disarmament, self-determination (for Europeans at least), and a League of Nations to provide collective security. French Premier Georges Clemenceau sniffed that Wilson's agenda would be splendid if only men were not men, and indeed the agenda failed for all too human reasons. Wilson grew so intoxicated with his messianic role and apparent popularity, and so exaggerated America's leverage and his own war powers, that by

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37. War Message to Congress, April 2, 1917, Ray Stannard Baker, ed., *The Public Papers of Woodrow Wilson, volume 1* (Harper's, 1925), pp. 6-16.

38. Lloyd Gardner, "A Progressive Foreign Policy, 1900-1921," in W. A. Williams, ed., *From Colony to Empire* (John Wiley, 1972), p. 218.

39. http://www.cooperativeindividualism.org/wilson-woodrow_idea-of-america.html

40. On the tendency of Wilson and Protestant clergy to interpret America's entry into the war as an evangelical, even millenarian crusade, see Richard Gamble, *War for Righteousness: Progressive Christianity, the Great War, and the Rise of the Messianic Nation* (Intercollegiate Studies Institute, 2003). The most convincing interpreter of Wilson's statecraft, in my opinion, is Lloyd Ambrosius, *Woodrow Wilson and the American Diplomatic Tradition: The Treaty Fight in Perspective* (Cambridge University Press, 1987); *Wilsonian Statecraft: Theory and Practice of Liberal Internationalism During World War I* (Scholarly Resources, 1991); *Wilsonianism: Woodrow Wilson and His Legacy in American Foreign Relations* (Palgrave Macmillan, 2002).

Armistice Day he really expected to dictate terms to the Germans, the Allies, and the United States Senate. He broke precedent by personally negotiating the Treaty of Versailles and insisting that the League Covenant be part of it. He appointed no Senators to the American delegation and asked none for advice even though Republicans had won a majority in the November elections. Then, upon hearing of opposition on Capitol Hill, he retorted: "The Senate must take its medicine."[41]

Of course, myth has it that Wilson was a prophet martyred by mossback isolationists. In fact, Henry Cabot Lodge (R., Mass.), chairman of the Foreign Relations Committee, was a distinguished scion of Boston bluebloods. He was a prolific historian with a Ph.D., conversant in six languages. He was far more cosmopolitan than Wilson. Nor did Lodge represent isolationists because he tried to build a coalition to ratify the treaty *in defiance of* the dozen or so Irreconcilables led by Senator William Borah (R., Ida.). Finally, Lodge addressed real Constitutional issues by drafting fourteen reservations to ensure that U.S. membership in the League of Nations would not contravene the powers of Congress to declare war, regulate commerce and immigration, and so forth. But Wilson refused all compromise, leaned on Democrats to oppose the reservations, and thereby killed the last chance for ratification.

Myths and Realities of the Interwar Years

Twenty-five years later, Franklin D. Roosevelt's (FDR's) publicity juggernaut popularized the mythical history of the League debate in order to preempt any opposition that might arise to the United Nations after World War II. Their partisan branding of "Republican isolationists" proved so effective that it tainted the history of the whole interwar era. Children of the day all learned in school that Wilson's tragic defeat restored Congress to primacy; that the United States sank back into isolationism during the 1920s; and that Republicans from the provincial Great Plains sponsored the 1930s Neutrality Acts that prevented FDR from confronting the fascist threat until it was too late.

The truth was almost the opposite. The administrations of Warren G. Harding, Calvin Coolidge, and Herbert Hoover were bastions of eastern Republican internationalism. They even promoted such Wilsonian goals as disarmament, collective security, and the Open Door. But instead of relying on rhetorical, moral appeals, they engaged in tough diplomacy, deft deployment of private capital, and informal *ententes* with business and governments to manage global markets in commodities, communications, and transport. Secretary of State Charles Evans Hughes crafted the Washington Conference treaties of 1921-22 that reduced the navies of the Great Powers and guaranteed the integrity of China. Americans drafted and funded the Dawes Plan that ended Europe's ruinous postwar inflation, promoted economic recovery, and encouraged France and Germany to embrace collective security in the Locarno pacts. Of course, everything fell apart in the Great Depression, but even then President Hoover tried to restore international cooperation. It was Franklin Roosevelt who ran on an isolationist platform in 1932 and pursued economic

41. Paterson, *American Foreign Policy*, p. 267.

recovery through autarky. Democratic majorities passed the Neutrality Acts of 1935 to 1938, and FDR signed them. When at last he did move to rearm the United States, Roosevelt got crucial support from "Fortress America" Republicans.[42]

In terms of Constitutional issues, however, conventional wisdom has it right. The greatest surge in presidential authority in foreign affairs and defense happened on Roosevelt's watch. Pearl Harbor marked the beginning of a 50-year emergency during which the United States fought for the future against fascist and communist rivals. That perma-crisis inevitably magnified the President's war powers. But under the radar, Roosevelt and his successors also expanded their peace powers through wholesale use of executive agreements in lieu of treaties.

The tipping point came in 1936 when *United States vs. Curtiss-Wright* reached the Supreme Court. Bolivia and Paraguay were waging their bitter Chaco War, and Congress gave FDR the option of imposing an arms embargo. When Curtiss-Wright Aviation defied the ban and got sued by the Justice Department, its defense was that Congress had improperly surrendered its power over foreign trade to the President's "unfettered discretion." The Court as usual found for the executive, but Justice George Sutherland (a Harding appointee) rendered breathtaking *obiter dicta* suggesting that presidential authority in foreign affairs was virtually limitless. Sutherland argued that in 1776 the union of the thirteen states became sovereign and, thus, assumed all the "right and power of the other members of the international family." Therefore, "the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, [even] if they had never been mentioned in the Constitution, would have [been] vested in the federal government as a necessary concomitant of nationality." But where in the federal government? Sutherland, citing (out of context) an opinion of John Marshall, found that the President vested with "the very delicate, plenary, and exclusive power ... as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress...."[43]

Sutherland's history was as flawed as it was gratuitous. In 1776 the several states declared *themselves*, not the Continental Congress, to be sovereign vis-à-vis Britain. The Articles of Confederation likewise declared that each state retained its sovereignty, freedom and independence, and defined the United States as a "firm league of friendship." It was precisely to replace that (not so firm) league with a genuine government that Federalists convened in Philadelphia in 1787. Even the Constitution, by reserving some powers to Congress, belied the idea of the executive as "sole organ." Nevertheless, scholars concur that *Curtiss-Wright* was a "radical, path-breaking act" that invited White House and State Department lawyers ever since to arrogate powers to the President, while excusing

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42. See Justus Doenecke and John Wilz, *From Isolation to War: 1931-1941* (Harlan Davidson, 2003) and Doenecke, ed., *In Danger Undaunted: The Anti-interventionist Movement of 1940-1941 as Revealed in the Papers of the America First Committee* (Hoover Institution, 1990).

43. Michael J. Glennon, *Constitutional Diplomacy* (Princeton University Press, 1990), pp. 18-20; John Yoo, *Crisis and Command: The History of Executive Power from George Washington to George W. Bush* (Kaplan Press, 2009), pp. 289-93.

the courts from interfering.[44]

That meant presidents might make deals of all sorts with foreign governments without the Senate's advice and consent. If they required an appropriation then, of course, Congress must approve, but only by a simple majority in both houses. Not coincidentally, 1937 was the year when the "curves crossed" on the chart—ever since then the number of executive agreements has vastly exceeded the number of treaties. Whereas from 1900 to 1933, presidents concluded 388 executive agreements and 411 treaties, from 1933 to 1979 they made 8,405 executive agreements and 550 treaties.[45]

This was hardly the original intent of the Framers. In Federalist No. 64, John Jay cautioned against *any* delegation of the power to make treaties, naming it just as important as war, peace, and commerce. James Madison considered the making of treaties a legislative function insofar as they become part of the highest law of the land. Even Alexander Hamilton conceded, in Federalist No. 75, that the treaty power belonged "properly neither to the legislative nor the executive" but is a shared responsibility. Presidential scruples reflected those judgments. When Monroe received the 1817 Rush-Bagot Accord, an exchange of notes with Britain agreeing to demilitarize the Great Lakes, he sent it to the Senate for its opinion on whether it *needed* to be sent to the Senate![46] Executive agreements became gradually more common by the twentieth century without raising hackles because most of these agreements were postal conventions, fishery accords, and the like. But starting with Theodore Roosevelt, presidents began to do serious business through executive agreements that bypassed the Congress. The Root-Takahira and Lansing-Ishii Accords of 1908 and 1917, for instance, defused war scares between the United States and Japan through painful compromises that probably could not have won two-thirds support in the Senate. Under FDR, executive agreements became the norm. Does that amount to a dangerous usurpation of power by the executive or shameful abdication on the part of Congress? The answer is "no," because usually the Senate either approves of the agreements, does not know or care about their substance, or else is happy to skip burdensome hearings. What does exercise Congress and the public is when presidents appeared, in retrospect, to have exploited executive privilege to make war.

The latest example is the controversy over the motives for the George W. Bush administration's invasion of Iraq in 2003. But the first example was Pearl Harbor. Even

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44. David Gray Adler and Larry N. George, *The Constitution and the Conduct of American Foreign Policy* (University of Kansas Press, 1996), p. 26. The Supreme Court reinforced its judgment in favor of the executive branch in its 1937 decision in *United States v. Belmont*. After recognizing the USSR in 1933, Roosevelt approved an executive agreement with Soviet authorities that liquidated debts to American citizens incurred by the defunct tsarist regime. Augustus Belmont sued for relief on the grounds that the agreement violated New York State property law. The Court held that "in respect of our foreign relations generally, state lines disappear" and the President speaks for the nation (Yoo, *Crisis and Command*, p. 292).

45. Lawrence Margolis, *Executive Agreements and Presidential Power* (Praeger Press, 1986), p. 108.

46. Edward Corwin, *The President's Control of Foreign Relations* (Princeton University Press, 1917), pp. 117-18.

today historians are finding circumstantial evidence that FDR indeed hoped his executive acts, such as the undeclared war against German U-boats and freezing of Japanese assets, might provoke an attack forcing the hand of Congress.[47] This controversy is still relevant because the Pearl Harbor Syndrome—fear of a sneak attack—is the strongest justification for presidential prerogatives, including pre-emptive strikes. But the other Pearl Harbor Syndrome—fear of presidential chicanery—has been the strongest justification for restriction of presidential prerogatives. As early as August 1940, when Roosevelt made an executive agreement to trade U.S. destroyers for British bases, Wendell Willkie called it "the most dictatorial and arbitrary act of any President in the history of the United States."[48]

Dr. Win-the-War Vastly Expands Presidential Control over War and Diplomacy

After Pearl Harbor, Roosevelt (Dr. New Deal) morphed overnight into Dr. Win-the-War. In that role, he committed far more dictatorial and arbitrary acts with full support from Willkie, the Congress, and public. One was his quick establishment of a military tribunal to condemn German saboteurs with the *ex post facto* compliance of a Supreme Court that "did not want to be perceived as just standing by while six men were executed."[49] (Needless to say, the George W. Bush administration failed to take advantage of that precedent regarding its treatment of terror suspects.) Another notorious measure was internment of Japanese Americans. The *nisei* also got their day in court, but in December 1944 the Supreme Court in *Korematsu vs. United States* found in the government's favor. Justice Hugo Black wrote for the 6-3 majority that they were "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast area at the time they did."[50] That was later damned as another Dred Scott decision, yet the issues it raised were revisited during the early Cold War and again since 9/11.

Roosevelt's conduct of inter-allied diplomacy during World War II can only be called thoroughly personal. He made the big decisions himself, especially in the summit meetings with Winston Churchill and Joseph Stalin at Teheran and Yalta. Perhaps the grandest executive agreements ever made were the Yalta Accords and follow-on Potsdam Accords, negotiated by Harry Truman. They took the place of peace treaties such that no Senate debate over America's role in the postwar world occurred except the one over the U.N. Charter. It proved another worrisome precedent because no subsequent American war

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47. See especially Marc Trachtenberg, *The Craft of International History: A Guide to Method* (Princeton University Press, 2006), and his recent posts on the H-Diplo web site.

48. Kenneth S. Davis, *FDR, Into the Storm, 1937-40: A History* (New York: Random House, 1993), p. 611.

49. http://en.wikipedia.org/wiki/Ex_parte_Quirin

50. Yoo, *Crisis and Command*, p. 318.

would end in an Article II treaty ratified by the Senate. They all ended in truces, accords, or U.N. resolutions that amounted to executive agreements.

Of course, the mere fact that the United States joined and expected to lead the United Nations represented a sea change in the legal context of foreign relations. It seemed that Americans had learned their lesson and fully embraced a Wilsonian new world order. In fact, FDR had unfurled the banner of Wilsonianism, beginning with the Atlantic Charter of 1941, because it was a powerful moral *weapon* in a war against evil. He was not a true believer. As a member of Wilson's Navy Department, he had witnessed his mistakes close up. He also admired the bluff nationalism of his cousin Theodore. So FDR's real blueprint was a United Nations run by a Security Council dominated, in turn, by his Four Policemen: the United States, USSR, Britain, and Nationalist China. They would not abolish force from world politics so much as exercise a monopoly of force. But that proved naive, because the only interest shared by the Communist Soviet Union, monarchical British Empire, and democratic United States was defeat of the Axis, and their alliance dissolved once that was achieved.[51] By the end of 1946, it was clear that the Soviets and Americans would not agree on U.N. control of atomic energy, dooming them to a nuclear arms race. By early 1947, the rapid decline of British power threw the burden of defending the eastern Mediterranean on to the United States. It was then that Senator Arthur Vandenberg (R., Mich.) advised Harry Truman and Dean Acheson to "scare the hell out of the American people" if they wanted Congress to make the commitment. The Truman Doctrine not only did that, it *universalized* the commitment so the United States theoretically pledged to defend any people anywhere whose freedom was threatened. Congress responded with $400 million for Greece and Turkey and then billions more in Marshall Plan grants for European recovery. In 1949, Congress even repealed Washington's "Great Rule" by ratifying NATO, the nation's first permanent peacetime alliance, by a vote of 82 to 13.

Constitutional Conundrums of Containment, or Why Korea Was Not a War

The greatest watershed of all followed the North Korean aggression of June 1950. Truman ordered General Douglas MacArthur to defend South Korea without consulting Congress at all. He mobilized the nation for protracted combat, imposed conscription, called up reserves, and authorized offensive action across the 38th parallel. Then, when the Communist Chinese intervened, he made the command decisions not to carry the war to the enemy, not to use all the weapons in America's arsenal, and not even to try to win—all on his own authority. Of course, Congress was called on to pay for the war and the across-the-board military build-up recommended in NSC-68. But Truman and his advisers did not think they needed approval from Congress or the U.N. to respond to aggression. To them, the North Korean assault was an obvious plot hatched in Moscow and Beijing to test the credibility of their new strategy of Containment, so they had no choice but to fight.

Truman's decisiveness has won almost unanimous praise from posterity. But legal

51. For the latest and best critical scholarship on FDR's postwar plans see Wilson D. Miscamble, *From Roosevelt to Truman: Potsdam, Hiroshima, and the Cold War* (Cambridge University Press, 2007).

scholar Louis Fisher bluntly concluded that

> the Truman Administration violated the plain language and the clear legislative history of the U.N. Charter and the U.N. Participation Act. Nothing supports the notion that Congress, by endorsing the structure of the United Nations as an international peacekeeping body, amended the Constitution by reading itself out of the war-making power. Congress did not —and could not—do so.

Truman implicitly granted that fact by resorting to word play. When asked in a news conference on June 29, 1950, whether the United States was at war again, he replied, "We are not at war." Would it be more accurate, asked the reporter, to call this a sort of "police action under the United Nations," to which Truman replied, "That is exactly what it amounts to."[52]

When is a war not a war? When a president does not want to ask Congress to declare it. Senator Robert Taft (R., Ohio) cried that Truman had "simply usurped authority" in violation of the Constitution. Secretary of State Acheson rebutted not only that the President had the authority, but that it "may not be interfered with by the Congress." At the time, Arthur M. Schlesinger, Jr., scorned Taft for a primitive. He ate his words later, during the Vietnam War, when he became the chief critic of "the imperial presidency."[53]

Almost everyone now praises Containment as a successful grand strategy, notwithstanding the enormous cost and occasional blunders made over the course of nine presidencies. But Containment, the Cold War, the limited hot wars it sparked, and the strategic arms race all tested the flexibility of American government like no other era. The machinery of America's international obligations did not mesh with the machinery of her governmental procedures, and if forced together they would have stripped their gears. Consider the Truman Doctrine. Journalist Walter Lippmann feared it might someday get American boys sent into battle in obscure Asian countries, and the Korean War soon proved him right. But was it technically true that a presidential doctrine or the U.N. Charter or treaties like NATO obligate Americans to fight in defense of other nations? If not, then U.S. commitments would lack credibility with friends and foes alike. But if so, then do not such commitments violate the Constitution? As the Senate Foreign Relations report on the 1978 Panama Canal agreement stated: "A treaty may not declare war."[54]

That is a sensitive issue that all branches of government prefer to ignore. In fact, all the collective security pacts of that era specified that their obligations would be carried out "by the Parties in accordance with their respective constitutional processes" (Article 43 of

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52. Adler and George, *The Constitution and the Conduct of American Foreign Policy*, p. 320.

53. Yoo, *Crisis and Command*, pp. 330-40. Legal scholar Edward S. Corwin in turn scorned Acheson, Schlesinger, historian Henry Steele Commager as "high-flying prerogative men" in *The New Republic*, Janary 29, 1951, p. 15. See also Schlesinger, *The Imperial Presidency* (Houghton Mifflin, 1973).

54. Glennon, *Constitutional Diplomacy*, p. 204. On the international and domestic legal puzzles conjured by the unique American practice of declaring presidential doctrines in foreign affairs, see Heiko Meirtöns, *The Doctrines of U.S. Security Policy* (Cambridge University Press, 2010).

U.N. Charter). The 1945 U.N. Participation Act authorized the President to furnish troops only with the approval of both houses of Congress. The NATO treaty requires each Party to take "such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area." Moreover, Acheson himself assured the Senate on April 12, 1949: "This does not mean that the United States would automatically be at war if we or one of the Parties to the Treaty were attacked. Under our Constitution, only the Congress can declare war." That is why legal scholar Michael Glennon concludes: "The evolution of Anglo-American constitutionalism is in no small part a history of the decline of the war-making power as a 'prerogative' power, a history of its transfer to legislative authorities.... So the negotiators wrote into the treaties the fullest measure of commitment that their domestic legal and political systems would allow—zero.... To pretend otherwise is to undermine the very constitutional processes that the treaties were intended to preserve."[55]

Of course, presidents always pretend otherwise, and Congress and the public almost always welcome the pretense. All parties realize that the world had become much smaller and more lethal since 1787, and that U.S. foreign policy must aim to prevent, not just respond to, hostile acts from abroad. Consequently, ever since the Korean War, the United States has maintained both a strong military posture and a global network of alliances. Most of us have lived our whole lives taking all that for granted. But Constitutionally speaking, the era since 1950 has been anomalous. The Framers could not conceive of a cold war or hot peace that puts the nation on a permanent war footing and enables the President to project force at a moment's notice. Nor, as former Secretary of the Navy John Lehman observed, could the Framers conceive of Congress being obliged to authorize huge defense expenditures beyond the two-year Constitutional limit or to create a huge defense bureaucracy that has become a virtual fourth branch of government.[56]

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55. Ibid., p.210.

56. See especially the concluding chapter in John Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress over How America Goes to War* (Charles Scribner's Sons, 1992). The atypicality of Cold War mobilization is demonstrated by statistics that show the size of standing U.S. armed forces has ceased to be determined by whether the nation is at war or at peace. During the Civil War some 2.8 million men served in uniform on one side or the other. From the end of Reconstruction in 1876 until 1898 all the armed forces combined shrank to between 34,000 to 43,000. During the era of Progressive Imperialism, 1898-1917, standing peacetime armed forces rose to between 100,000 and 175,000. During World War I, the United States quickly mobilized 2.5 million men, but after 1918 the military shrank back to about 250,000 prior to creeping up to 450,000 by 1940. World War II put an incredible 12 million Americans in uniform, but the services shrank to just 1.4 million by 1948. The Korean War more than doubled that total to 3.2 million. But Eisenhower's best efforts notwithstanding, deployments did not shrink much after the Korean truce. Instead, active U.S. military personnel hovered between 2 and 3 million for the duration of the Cold War. In 2008 the Pentagon counted 1,385,122 on active duty and 1,458,500 reservists, many of whom have been deployed since 9/11.

Dissolution of Cold War Consensus: The Tonkin Gulf Resolution and Vietnam War

President Dwight Eisenhower's 1961 Farewell Address warned of the dangers to democratic governance posed by a permanent military-industrial complex and scientific-technological elite. He confessed he had no solutions, but understood well that the Cold War placed an even greater premium on bipartisanship in foreign affairs. Politics must stop at the water's edge. So Eisenhower ended the divisive Korean War and Joseph McCarthy hearings, then reached out to Democrats, especially Majority Leader Lyndon Johnson (D., Tex.), for bipartisan support, primarily of military deployments. Otherwise, Eisenhower relinquished no prerogatives. He designed a completely new military strategy, the New Look, which made Containment dependent on nuclear deterrence (Massive Retaliation) and alliances encircling the Soviet bloc. He pronounced the January 1957 Eisenhower Doctrine that specifically applied the Truman's Doctrine's commitment to the Middle East. He added to the executive's tool kit the use of the Central Intelligence Agency for covert operations in Iran, Guatemala, and elsewhere. Not least, Eisenhower angrily opposed an amendment by Senator John Bricker (R., Ohio) that sought to prohibit the substitution of executive agreements for treaties.[57]

John F. Kennedy pushed bipartisanship and brinkmanship to the limit in 1962 when he scoffed international law and risked nuclear war by subjecting Castro's Cuba to a naval quarantine, then resolved the crisis through an executive agreement with Nikita Khrushchev. The terms of this agreement were not even made public. Nor did Kennedy consult Capitol Hill when he sharply increased the U.S. Special Forces in South Vietnam and extended security guarantees to other friendly authoritarian regimes such as Francisco Franco's Spain.[58] He even persuaded Congress to relinquish another of its Constitutional duties through the Trade Expansion Act of 1962. It gave the President fast-track authority to negotiate tariff reductions under the General Agreement on Tariffs and Trade. That was a practical recognition that no omnibus free trade agreement stood a chance in Congress if all the lobbyists were free to chew over it.

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57. In private, Eisenhower was heard to grumble, "If it's true that when you die the things that bothered you most are engraved on your skull, I am sure I'll have there the mud and dirt of France during invasion and the name of Senator Bricker" (Louis Galambos, ed., *The Papers of Dwight D. Eisenhower: The Presidency* (Johns Hopkins University Press, 1996), document 707). During the hearings on the Bricker Amendment, Senator Guy Gillett (D., Iowa) asked a State Department official to clarify the difference between a treaty and an executive agreement. He was told, "a treaty was something they had to send to the Senate to get approval by two-thirds vote. An executive agreement was something they did not have to send to the Senate." That said it all.

58. In 1963, Kennedy told the Spanish Caudillo that "a threat to either country ... would be a matter of common concern to both." Franco warmly concurred. But did JFK have the power to commit America to the defense of Spain? During the Spanish Civil War in the 1930s, Roosevelt and Congress had agreed the answer was "no" (see Dominic Tierney, *FDR and the Spanish Civil War: Neutrality and Commitment in the Struggle That Divided America* (Duke University Press, 2007), but the Kennedy administration invoked the Truman Doctrine that implied the answer was "yes" in every case (Schlesinger, *Imperial Presidency*, p. 202).

When Lyndon Johnson likewise sought bipartisan sanction for regional military deployments it then seemed so routine that Chairman of the Senate Foreign Relations Committee, J. William Fulbright (D., Ark.), willingly sponsored the 1964 Tonkin Gulf Resolution. It granted the President authority to take whatever military measures deemed necessary to prevent "aggression" in Southeast Asia. Two years later, when the so-called Vietnam "conflict" was escalating with no end in sight, Congressmen decided they had been tricked and Fulbright damned the Johnson administration for succumbing to "the arrogance of power." But the real issue at stake in the Vietnam debacle was not that Secretary of Defense Robert McNamara might have lied about the alleged Tonkin Gulf attacks, or that Johnson exploited the resolution to make war. The real question was how easily a president's legitimate powers could be used to create a situation that all but compelled Congress to support the troops. That dilemma has frustrated *some* Congressmen in almost every conflict since Vietnam. But it has probably been a source of relief to *most* because deferring to the President's judgment frees them to share the glory if things go well yet still blame the White House if they don't.[59]

In any event, the original intent of the Tonkin Gulf Resolution was moot. A federal district judge ruled in 1968 that the Vietnam War effort was Constitutional on the grounds that a majority in Congress had the power to cut off funds for it whenever they chose. Instead, the Democratic majority after 1969 only gradually withdrew support for what it then called Nixon's War, repealed the Gulf of Tonkin Resolution in 1971, and after the 1973 Paris Peace Accords, tried to prohibit any future military activity in Southeast Asia. Nixon vetoed the bill and barely survived an override vote.

The War Powers Resolution and Rout of the Congress

What did pass the Congress over Nixon's veto in 1973 was the infamous War Powers Resolution (WPR), perhaps the most ambitious Congressional effort to bridle the President since the battle with Andrew Johnson over Reconstruction. The WPR is worth reading—once—then forgetting, because its convoluted, contradictory, and doubtless unconstitutional mix of instructions, restrictions, and ticking clocks has never been honored by any administration or upheld by any court. Presidents Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush all dispatched U.S. forces into combat situations without paying more than lip service to the WPR. In 1990, following Saddam Hussein's invasion of Kuwait, President Bush stationed 100,000 personnel in Saudi Arabia. He sought no authorization and, in fact, informed just one member of Congress: Senator Sam Nunn (D., Ga.). When he then prepared Operation Desert Storm to liberate Kuwait, 54 Congressmen led by the chairman of House Armed Services Committee, Berkeley radical Ron Dellums (D., Calif.), filed for an injunction to stop the war. U.S. District Judge Harold H. Greene ran for cover. Noting that 54 fell far short of a majority

59. See Edwin E. Moise, *Tonkin Gulf and the Escalation of the Vietnam War* (University of North Carolina Press, 1996); J. William Fulbright, *The Arrogance of Power* (Random House, 1966). The discussion of the real issue surrounding the Vietnam is based on Henkin.

he judged the case "not ripe for judicial determination."[60]

Even if upheld, the War Powers Resolution could not possibly fulfill its intentions. First, no one wants the President to be prohibited from acting in emergencies. Second, the 60 or 90 day periods after which the President must get Congressional authorization do not begin until the President, at his leisure, reports the deployment. Third, once U.S. troops are in a combat zone it is not likely that Congress will publicly ensure the defeat of their mission. In the first Gulf War, the real clock was set by the U.N. Security Council whose Resolution 678 required Iraqi forces to withdraw from Kuwait by January 15, 1991. That put Congress under a deadline. Three days of frantic debate ensued until, on January 12, the sullen chambers voted to authorize force by 250 to 183 in the House and 52 to 47 in the Senate. House Speaker Tom Foley called it "the practical equivalent of a declaration of war." By then it was crystal clear that the War Powers Resolution was "a bad idea whose time has come and gone."[61]

Far from rolling back presidential authority in the wake of Vietnam and Watergate, Congress failed to prevent yet another big arrogation of Constitutional power by the least likely of presidents, Jimmy Carter. He suddenly announced that the United States would grant full recognition to the People's Republic of China on January 1, 1979. That was an act blessed by the Constitution itself. But as part of the package, Carter had to terminate the 1955 Mutual Defense Treaty with the Nationalist Chinese regime on Taiwan. That was a treaty ratified by two-thirds of the Senate. Did the President alone have the right to un-ratify? Senators led by Barry Goldwater (R., Ariz.) filed a Constitutional challenge, but the Court of Appeals ruled against it and the Supreme Court refused the case on the grounds that it "involves the authority of the President in the conduct of our national foreign relations."[62] (This time, however, Congress got a last laugh of sorts. Just as it learned after George Washington to attach amendments to treaties made by the President, so now it learned to pass laws that effectively amend treaties un-made by the President. Thus, did the April 1979 Taiwan Relations Act mandate the continued sale of weapons to the Taipei regime and, thus, give the Mutual Defense Treaty new *de facto* life.)

The rapidity with which the executive branch reasserted its "sole organ" status was perhaps most evident when Carter used his 1980 State of the Union address to add his own to the growing list of presidential edicts. He had begun his term as a post-Watergate, post-Vietnam Democrat who implicitly repudiated Truman's heritage as well as Nixon's in his Notre Dame speech of 1977. But following the Soviet invasion of Afghanistan, he pledged in the Carter Doctrine to take whatever war measures necessary to defend the Persian Gulf states from aggression and ensure the free flow of oil. Thus did American power fill the vacuum created by Britain's retreat from her bases "east of Suez" in 1971, just as quickly and thoroughly as it had the eastern Mediterranean back in 1947. This time, however,

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60. Adler and George, *The Constitution and the Conduct of American Foreign Policy*, p. 42.

61. Lehman, *Making War*; "come and gone," by Edward Keynes in Adler and George, *The Constitution and the Conduct of American Foreign Policy*, p. 252.

62. *Goldwater v. Carter*, 444 U.S. 996 (1979).

Congress was not even asked to vote.[63]

Ronald Reagan's administration acted as if the WPR simply did not exist. It dispatched 1,200 marines to Beirut, launched an invasion of Grenada, sent advisers to El Salvador, and funneled aid to the Afghan Mujahedin and Nicaraguan Contras, which the White House praised as "Freedom Fighters" for resisting Communist regimes. In a column for *TIME* magazine, Charles Krauthammer later labeled the policy of assisting anti-Communist guerillas the Reagan Doctrine.[64] Democrats in Congress hated such *noblesse oblige*, especially on the part of an unabashedly conservative President. So they passed three amendments named for Congressman Edward Boland (D., Mass.) that prohibited aid to the Contras. Their increasingly tortuous terms, meant to close every conceivable loophole, were what gave National Security Council officials the bright idea of funneling secret funds from Iran to Central America. Reagan confessed the affair was wrong and assumed responsibility. Yet after the televised hearings, starring Colonel Oliver North, Congress emerged from the Iran-Contra Affair at least as embarrassed as the White House.

Meanwhile, a very interesting novelty had emerged in the "twilight zone" regarding the federal government's war powers. The executive branch, having successfully rendered the WPR anodyne, but also having recognized the real need for accountability and prudence in the wake of the Vietnam War, began to *check and balance itself*! Secretary of Defense Caspar Weinberger delivered a stunning speech to the National Press Club in November 1984 that laid out, what immediately came to be known as, the Weinberger Doctrine. Never again, he said, should an American President send forces into combat unless six severe conditions were met and only after all alternatives had been exhausted. The short-range cause of the initiative was Reagan's catastrophic deployment of U.S. Marines in Beirut, where 241 were killed by a terrorist bomb. The longer-range causes included the determination of the Joint Chiefs of Staff, not to mention the Congress and public, that there should be "no more Vietnams." Not surprisingly, the strongest internal opposition came from Secretary of State George Shultz, because effective diplomacy often requires the threat of force behind it. But for a number of years thereafter, the idea of the executive branch placing checks on itself got traction. Thus, General Colin Powell, in the run-up to the First Gulf War in 1991, added his own list of prerequisites that ought to be met prior to the dispatch of U.S. forces into overseas combat.[65]

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63. Zbigniew Brzezinski drafted key sentences in the Carter Doctrine and modeled them on the words of the Truman Doctrine Carter had hoped to supersede: Brzezinski, *Power and Principle: Memoirs of the National Security Advisor, 1977-1981* (Farrar, Straus, Giroux, 1983), p. 444.

64. "The Reagan Doctrine," *TIME,* April 1, 1985.

65. The Weinberg-Powell Doctrine included a list of conditions that must be met in advance of a deployment:

1. The United States should not commit forces to combat unless the vital national interests of the United States or its allies are involved.

2. U.S. troops should only be committed wholeheartedly and with the clear intention of winning. Otherwise, troops should not be committed.

3. U.S. combat troops should be committed only with clearly defined political and military

After the 9/11 attacks, needless to say, Congress was thoroughly routed and even cautious voices in the executive branch were silenced. George W. Bush requested a resolution granting him authority "to deter and pre-empt any future acts of terrorism or aggression against the United States." The House Committee on International Relations changed "preempt" to "prevent" (which, in any case, could be construed to *include* preemption) and the resolution passed by votes of 420-1 and 98-0. It gave the President authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons...."[66] The administration invoked that authority to overthrow the Taliban regime in Afghanistan, then invade Iraq in 2003 (on the basis of flawed intelligence regarding Saddam Hussein's programs for weapons of mass destruction). Both operations provoked local counterinsurgencies that attracted international support. Both are ongoing under Barack Obama, who seems determined to play the role of Richard Nixon, prolonging an unpopular war in hopes of redeeming it, even as George W. Bush had appeared to play the role of his fellow Texan Lyndon Johnson.

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objectives and with the capacity to accomplish those objectives.

4. The relationship between the objectives and the size and composition of the forces committed should be continually reassessed and adjusted if necessary.

5. U.S. troops should not be committed to battle without a reasonable assurance of the support of U.S. public opinion and Congress. (Some lists also mention international support.)

6. The commitment of U.S. troops should be considered only as a last resort.

66. http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html

CONCLUSION: PERHAPS ALL SAIL AND NO ANCHOR ISN'T SO BAD

By now it should be clear why a chapter in a book on the Constitution and foreign relations is simply entitled: "Why the President Almost Always Wins in Foreign Affairs" and a recent article is entitled "Why Hawks Win." First, the executive almost always takes the initiative; second, Congress almost always acquiesces; third, the courts always demur on the grounds that war and diplomacy are in the domain of the "political branches."[67] For better or worse, the U.S. government has changed a great deal since the great Federalist lawyer James Wilson assured the Pennsylvania Ratifying Convention: "This system will not hurry us into war; it is calculated to guard against it. It will not be within the power of a single man, or a single body of men, to involve us in such distress."[68]

But before we praise or blame the assertive chief executives or passive legislatures and jurists who have wrought or acquiesced in great changes, we need to place them all in their historical contexts. Every change was a response to a challenge born of new circumstances at particular times. We may judge them to have been wise or foolish by their results, and worthy or unworthy of being precedents by the persistence of the challenges that inspired them. But we would be wise to listen to Louis Henkin, who delivered the prestigious Cooley Lectures at the University of Michigan Law School on the Constitution's bicentennial. Henkin worried about presidential abuse of the war powers, yet held to the dictum "if it ain't broke, don't fix it" because a healthy "tension in the twilight zone" had enabled the federal government to adapt to America's role as a world power in an era of revolutionary change. He prescribed no major amendments to the Constitution and concluded that even if British critic Thomas Macauley was right that our Constitution is "all sail and no anchor," perhaps all it needs is a rudder.[69]

Perhaps, but that begs the question of who or what can serve as rudder of the American ship of state. Congress is unable or unwilling to do so, serving primarily as a squeaky brake that engages too late to prevent executive blunders but often in time to snatch defeat from the jaws of possible victory.[70] Courts are unable and unwilling to steer

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67. See the pithy political insights of Harold Hongju Koh, "Why the President Almost Always Wins in Foreign Affairs" in Adler and George, *The Constitution and the Conduct of American Foreign Policy*, pp. 158-80; and the pithy psychological insights of Daniel Kahneman and Jonathan Renshon, "Why Hawks Win," in *Foreign Affairs,*(January/February 2007.

68. Jonathan Eliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 4 vols. (1836), cited by Adler, "The Constitution and Presidential War-making: The Enduring Debate," *Political Science Quarterly*, Spring 1988, pp.1-36.

69. Letter to H. S. Randall, May 23, 1857, in G. O. Trevelyan, *The Life and Letters of Lord Macauley* (1875), pp. 409-10. The Cooley lectures were the basis for Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (Columbia University Press, 1990).

70. An excellent new book by William G. Howell and Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers* (Princeton University Press, 2007) argues that whereas the Congress speaks with many voices and must usually act indirectly to restrain executive

policy. So that leaves it up to the ultimate arbiters in our Constitutional system: the American people themselves. Presidents may abuse their war powers and/or commit malpractice in foreign affairs, but so long as they do not arrogate to themselves the power to suspend elections "for the duration," the voters are empowered to oust the people or party in charge every two or four years. Granted, public opinion is a rude instrument subject to all sorts of manipulation, short-sightedness, folly, and overreaction: *Vox populi* isn't *vox dei*. But in our system it is sovereign, which is why we have little choice but trust Theodore Roosevelt's principle embedded in the Progressive "Bull Moose" Party platform of 1912: "We hold with Thomas Jefferson and Abraham Lincoln that the people are the masters of their Constitution, to fulfill its purposes and to safeguard it from those who, by perversion of its intent, would convert it into an instrument of injustice."[71]

Finally, before rendering judgment on 222 years of Constitutional adaptation we need to perform one more pressing task, which is to define what we now mean by war in an era of nuclear weapons, cold war, limited war, counterinsurgency, and terrorism by non-state actors. For instance, if the War on Terror is a war as traditionally understood, then preemptive strikes, restrictions on civil liberties, and semi-permanent nation-building operations in darkest Asia are clearly within presidential authority. But to that one could retort, if the War on Terror is a war as traditionally understood, then it ought to be *declared by Congress and re-declared every two years*. But to that one could retort, if the War on Terror is truly a war, then against whom would Congress declare it? The world has moved so far from the era of blatant fascist aggression, not to mention staid monarchical wars, that our Constitutional language seems inadequate. Yet, its very sparseness and ambiguity allow us to hope that the United States may continue to adjust relatively quickly, if not smoothly, to whatever new challenges loom.

Justice Louis Brandeis put the point elegantly in a dissenting opinion of 1926. "The doctrine of the separation of powers," he wrote, "was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments, to save the people from autocracy."[72] So stipulated! As long as "We the People" revere our Constitution it cannot harm our national interest, because the Constitution *is* our national interest, the very *content* of our Exceptionalism.

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assertion, it can nonetheless wield meaningful influence through hearings, protests, budgetary procedures, and especially the media and public opinion.

71. http://teachingamericanhistory.org/library/index.asp?document=607

72. *Myers vs. United States*, 272 U.S. 52, 293, in Glennon, *Constitutional Diplomacy*, p. 325.

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